Petition

No. 81-1103

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

THERMOFIL INCORPORATED,
Petitioner,

-VS-

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

(1) Is an employee, who acts individually by walking off his job, engaged in concerted activity within the meaning of Section 7 of the National Labor Relations Act, 29 USC 151 et. seq., when no other employee joins, encourages or endorses his actions nor does he seek to engage any others in such activity?

(2) Can an employer be found to have violated Section 8(a)(1) of the Act even though the employer does not have knowledge that the individual employee's activity is concerted?

(3) Is an employer required to determine whether individual activity is disavowed by other employees in order to protect itself from a violation of Section 8(a)(1)?

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IN THE
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THERMOFIL INCORPORATED,*
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Repondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

The Order and Dissenting Opinion of the Court of Appeals (App. A, *infra*, pp. 1a-2a) is reported at 650 F.2d 858 (6th Cir. 1981); the Decision and Order of the National Labor Relations Board 224 NLRB No. 171 appears in App. B, *infra*, pp. 3a-6a and is reported at 108 LRRM 1271. The Decision of the Administrative Law Judge appears in Appendix C, *infra*, pp. 7a-19a. The Order of the Sixth Circuit Court of Appeals, the Order Staying Mandate and the Order Further Staying Mandate are attached as Appendices D, E, and F respectively.

JURISDICTION

The judgment of the Court of Appeals was decided and filed on June 11, 1981. The Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc was denied on September 14, 1981. This Petition for Certiorari was timely filed within ninety (90) days of that date. The Order Staying the Issuance of Mandate for thirty days was filed on October 21, 1981. The Order Further Staying the Issuance of

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* Subsidiary of Thermofil National Corp.

the Mandate until December 23, 1981 was filed on December 4, 1981. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act ("Act"), as amended, 29 USC 151, et. seq., are as follows:

> Section 157: Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.
>
> Section 158(a): It shall be an unfair labor practice for an employer . . .
>
> * * *
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title; . . .

STATEMENT OF THE CASE

Petitioner, Thermofil Incorporated, is a Michigan corporation, located in Brighton, Michigan, engaged in the manufacture, sale and distribution of plastics and related products. Thomas Singer is an individual who worked for Petitioner as an extruder machine operator from April 22, 1977 until March 1, 1978.

As an extruder operator, Singer was responsible for preparing his assigned machine and operating it to produce plastic pellets. These pellets are produced from various melted mixes and sold to customers who transform them into other products. Machine preparation, which is generally referred to as "changeover", requires the operator to clean the extruder of all traces of a particular plastic mixture so that a new mixture may be run. This is done by allowing the old mixture to run onto the floor where it forms plastic masses referred to as "goobers."

The operator's job during changeover is to keep the goobers a reasonable size and pull them to the side of the machine for cooling. Once they have cooled, the operator places them in boxes. These boxes are stored, occasionally, in the area of the extruder machines.

Upon reporting for his regular shift on March 1, 1978, Singer began to changeover his machine from black to clear plastic. Singer was unable to perform the procedure properly, however, and hot strands of plastic became wrapped around a conveyor belt clogging his machine.

Singer shut the machine off and went alone to speak to his supervisor, Bryce Johnson. The Administrative Law Judge found that at this juncture:

> . . . [Singer] told [Johnson] the place was f_ _ _ _ _ up and he could not work; that Johnson had seen the boxes stacked out there leaning and so close to the machines there was no room to work; that the material was too hot and the pelletizer was plugged up.[1]

Johnson offered to help Singer, but Singer refused to work stating that he was going home and that they should call him when the place was cleaned up. Johnson proceeded to Singer's workplace, cleared the area and machine of the

[1] Singer's statement to Johnson is subject to dispute. Johnson did not recall Singer saying that the stacked boxes were unsafe or that Singer did not have enough room to work.

plastic strands, adjusted the machine, and operated it until the end of the shift.

Although at the time Singer walked off his job another employee was working within several feet of him, and other employees were working in the plant, Singer did not, in any way, involve or consult with these employees concerning his action. It is undisputed that no other employee complained about the boxes on the night that Singer walked off his job and refused to return to work. No evidence was presented that other employees supported, encouraged or endorsed Singer's walkout on March 1st. Although other employees had complained about the stacked boxes in the area of the extruders long before Singer's action, there is no evidence that Singer was concerned with the working conditions of other employees or that other employees were concerned on March 1st about the condition of Singer's work area.

The next day, March 2, 1978, Robert Darga, Petitioner's Vice President, determined that due to Singer's refusal to accept his supervisor's offer of help and Singer's refusal to return to work, Singer had voluntarily terminated his employment. Therefore, Darga refused to reinstate Singer when he later inquired about his job.

On March 20, 1978, Singer filed a charge with the National Labor Relations Board ("Board"), alleging that Petitioner violated Section 8(a)(1) of the National Labor Relations Act by discharging him because of his protests about job safety and working conditions. After a complaint was filed by the Board, a hearing was held before an Administrative Law Judge on October 30 and 31, 1978. On May 14, 1979, the Administrative Law Judge issued her opinion, concluding that Petitioner violated Section 8(a)(1).

After timely objections to the Administrative Law Judge's decision were filed, the Board issued a decision on September 14, 1979 adopting without opinion the rulings, findings and conclusions of the Law Judge. Petitioner,

thereafter, filed a timely Petition to Review and Set Aside the Decision and Order of the Board with the United States Court of Appeals for the Sixth Circuit pursuant to Section 10(f) of the National Labor Relations Act, 29 U.S.C. 159(f). The Board cross-petitioned for enforcement of its Order. On June 11, 1981, the Sixth Circuit, with Judge Engel dissenting, entered an Order enforcing the Board's Order.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH ALL APPLICABLE DECISIONS OF OTHER CIRCUIT COURTS ON THE ISSUE OF CONCERTED ACTIVITY.

This case presents an important issue in the development of a uniform federal labor law under the National Labor Relations Act: whether an employee engages in concerted activity within the meaning of Section 7 of the Act when his unilateral actions are merely related to a subject of employment theoretically of concern to other employees?

Section 7 of the Act provides that "employees shall have the right . . . to engage in . . . *concerted* activities for the purpose of collective bargaining or other *mutual aid or protection* . . ." (Emphasis added). Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees" who engage in such concerted activities. A critical issue presented in this case is whether Singer's action, which was purely unilateral and was not joined, encouraged, or endorsed by other employees, nor done in preparation for joint action, constituted "concerted activity" under these sections.

Clearly, Section 7 of the Act protects only those *activities* which are "concerted" and does not protect individual activity in response to a subject which theoretically concerns other employees. Statutorily, it is the activity which must be concerted and not merely the alleged objec-

tive of the activity. Until the Sixth Circuit's decision in this case, every Circuit which has addressed this issue has recognized that only when the individual acts as a representative of, or on behalf of other employees, or acts with the object of inducing or preparing for group action will individual action be considered "concerted." See *Socony Mobil Oil* v. *NLRB*, 357 F.2d 662 (2nd Cir. 1966); *NLRB* v. *Northern Metal Co*, 440 F.2d 881 (3rd Cir. 1971); *Mushroom Transportation Co*, v *NLRB*, 330 F.2d 683 (3rd Cir. 1964); *NLRB* v. *Buddies Supermarkets, Inc.*, 481 F.2d 714 (5th Cir. 1973); *ARO, Inc* v *NLRB*, 596 F.2d 713 (6th Cir. 1979); *NLRB* v. *Guernsey-Muskingum Electric Coop Inc.*, 285 F.2d 8 (6th Cir. 1960); *Indiana Gear Works* v. *NLRB*, 371 F.2d 273 (7th Cir. 1967); *NLRB* v. *Dawson Cabinet Co.*, 566 F.2d 1079 (8th Cir. 1977); *Walls Mfg. Co.*, v. *NLRB*, 321 F.2d 753 (D.C. Cir. 1963) cert. denied 375 U.S. 923 11 L. Ed 2d 166, 84 S. Ct. 265 (1963).

Despite being continually rebuffed by the Courts of Appeal, the Board obstinately follows the theory enunciated in *Alleluia Cushion Co.*, 221 NLRB 999 (1975), that concerted activity can be implied if the activity at issue is in some way related to conditions of employment.

The decision of the Sixth Circuit panel which granted enforcement in this case was rendered without benefit of a majority opinion. However, this fact does not detract from the significance of this case and its importance in the development of a uniform labor policy, since the Sixth Circuit's decision, with Judge Engel dissenting, has the result of adopting the "implied concerted activity" theory of *Alleluia Cushion Co*, relied on by the Administrative Law Judge in her decision.[2]

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[2] The Board affirmed its Administrative Law Judge's Decision without opinion. In that decision, the Law Judge relied on *Alleluia Cushion* and the following cases in which the Board applied the implied concerted activity theory: *Pink Moody, Inc.*, 237 N.L.R.B. 39 (1978); *St. Joseph's High School*, 236 N.L.R.B. 1623 (1978), *vacated*, 248 N.L.R.B. 901 (1980); *Akron General Medical Center*, 232 N.L.R.B. 920 (1977); *Air*

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In this case, Singer individually decided to abandon his work station because of difficulties he encountered operating his machine. There is no evidence that he was concerned with the working conditions of any other employee, that other employees were interested in his complaints on the night he walked off the job, or that any other employee supported his action. In fact, no employee joined in his walkout, nor did Singer seek to induce any other employee to do so.

Despite these undisputed facts the Administrative Law Judge concluded, and the Sixth Circuit has now enforced this conclusion, that Singer was discharged for his "concerted activity" (walking off the job) because the *subject* of Singer's complaints concerned conditions of employment affecting other employees:

> Singer's protest was therefore a protest about conditions of employment which were of concern to all employees subjected to those conditions. *It was accordingly protected concerted activity even absent a showing that other employees joined in his walkout where, as here, there is no evidence that fellow employees disavowed the substance of his complaint.* (App. C at 15a) (Emphasis added).

In reaching her conclusion the Administrative Law Judge specifically relied upon several Board cases,[3] the

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Surrey Corp, 229 N.L.R.B. 1064 (1977), *enforcement denied*, 601 F.2d 256 (6th Cir. 1979); *Dawson Cabinet Co.*, 228 N.L.R.B. 290 (1977), *enforcement denied*, 566 F.2d 1079 (8th Cir. 1977); *ARO, Inc.*, 227 N.L.R.B. 243 (1976), *enforcement denied* 596 F.2d 713 (6th Cir. 1979).

[3] See cases cited above in note 2. Significantly, the Administrative Law Judge had no alternative except to rely on *Alleluia Cushion, supra*, in light of the Board's declaration that it will adhere to this theory, despite rejection by Courts of Appeals, "until such time as the Supreme Court may determine the issue." *Hotel & Restaurant Employees and Bartenders Union, Local 28*, 252 N.L.R.B. No. 158, slip op. at 2 (1980).

most prominent of which is *Alleluia Cushion Co., supra* in which, an employee was terminated after filing a complaint with the California Occupational Safety and Health Administration. Despite the finding that the employee acted alone, the Board found that the employer violated Section 8(a)(1) of the Act:

> [W]here an employee speaks up and seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees in the absence of any evidence that fellow employees disavow such representation, we will find an implied consent thereto and deem such activity to be concerted. 221 N.L.R.B. at 1000.

Since adopting this fictional construction of Section 7, the Board has forged ahead to expand the implied concert theory of *Alleluia Cushion* to non-safety fact situations.[4] The evolution of the implied concert theory, absent the situation where a collective bargaining agreement is in existence[5], is best described by the Board in *Air Surrey Corp.*,

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[4] In *St. Joseph's High School,* 236 N.L.R.B. 1623 (1978) vacated 248 N.L.R.B. 1623 (1980), the Board found concerted activity where an employee complained about salary and other working conditions. In *Akron General Medical Center,* 232 N.L.R.B. 920 (1977), the Board found concerted activity where an individual complained about the existence of dust in the work area. Further, in *Dawson Cabinet Co.,* 228 N.L.R.B. 290, *enforcement denied,* 566 F.2d 1079 (8th Cir. 1977), the Board extended the implied concert theory to encompass an individual employee's refusal to perform a particular job unless she received pay equal to a male employee performing the same job. In *Pink Moody, Inc.,* 237 N.L.R.B. 39 (1978), the Board ruled that an employee was engaged in concerted activity when he voiced a personal complaint about the conditions of his employer's vehicles and refused to drive a truck. In *Air Surrey Corp.,* 229 N.L.R.B. 1064 No. 155 (1977), *enforcement denied,* 601 F.2d 256 (6th Cir. 1979), the Board found concerted activity by an employee who inquired at a Bank about his employer's solvency.

[5] The instant case is distinguishable from those cases where the Board and the courts have applied an implied concert theory when an individual

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229 NLRB 1064, *enforcement denied, Air Surrey Corp* v *NLRB*, 601 F.2d 256 (6th Cir. 1979):

> [*Alleluia Cushion*] rests not only on the statutorily expressed concern of the Federal and state government with respect to safety conditions and a corresponding accomodation of the principles of our own Act, but also on the premise that an individual's actions may be considered to be concerted in nature *if they relate to conditions of employment that are matters of mutual concern to all the affected employees*. 229 N.L.R.B. at 1064 (Emphasis added).

Simply put, the Board has created a fiction of implied concerted activity based upon the underlying subject matter an individual's actions and not upon a finding that an individual's actions are in fact concerted. By its decision in

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(Continued from page 8)

acts to enforce the provisions of a collective bargaining agreement. The leading case in this line is *NLRB* v. *Interboro Contractors, Inc.*, 388 F.2d 495 (2nd Cir. 1967). The premise of the *Interboro* doctine is that the individual activity is merely an extension of the original concerted activity which culminated in the collective bargaining agreement. *See NLRB* v. *Ben Pekin Corp.*, 452 F.2d 205 (7th Cir. 1971), and *NLRB* v. *John Langenbacher Co.*, 398 F.2d 459 (2nd Cir. 1968), *cert. denied*, 393 U.S. 1049, 22 L. Ed 2d 132, 89 S. Ct. 988 (1968).

Significantly, this theory of implied concert of action has itself engendered a conflict among the circuits. *Blaw-Knox Foundry & Mill Machinery, Inc.* v. *NLRB*, 646 F.2d 113, 116 (4th Cir. 1981) (the employee's altercation with a foreman was personal and "such personal missions are not deemed concerted activity under any test"); *ARO, Inc.*, v. *NLRB*, 596 F.2d 713, 717 (6th Cir. 1979) ("We think this expansive reading of the concerted activity clause of Section 7 goes too far. Indeed, the position of the Board in the present case extends the reach of the *Interboro* doctrine".); and, *NLRB* v. *Northern Metal Co.*, 440 F.2d 881, 884 (3rd Cir. 1971) ("*Interboro Contractors* appears to create a legal fiction, constructive concerted activity . . . We are unable to adopt such a fiction").

Further, this Court will note that even those Circuits that accepted *Interboro* refuse to enforce decisions based on the theory of implied concert of action of *Alleluia Cushion*. Obviously, any Court that rejects the *Interboro* theory cannot accept the theory in *Alleluia Cushion* since *Alleluia Cushion* applies to those instances where there is no collective bargaining agreement.

this case, the Sixth Circuit panel adopts that fiction, abandons its own precedence, and places itself in clear conflict with the other Circuits.

As Judge Engel stated in his well-reasoned dissent:

> I would deny enforcement because there is, in my opinion, no substantial evidence to support the finding that the action of employee Thomas Singer was concerted. Rather than showing that he was acting on behalf of or as a representative of the other employees, the evidence shows at best that his complaints were shared by others but that his individual conduct was entirely spontaneous. This case, therefore, falls squarely within the holding of our circuit in *NLRB* v *Guernsey-Muskingum Electric Coop., Inc.*, 285 F.2d 8 (6th Cir. 1960). See *Aro, Inc.* v *NLRB*, 596 F.2d 713 (6th Cir. 1979)[6] 650 F. 2d at 859

The chasm that the Sixth Circuit has created between itself and the other Circuits is best understood by looking at each Circuit which has considered the issue.

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[6] In *NLRB* v *Guernsey-Muskingum Electric Coop, Inc.*, 285 F.2d 8 (6th Cir. 1960), the Court held that when three employees jointly decided to engage in a protest for their common good, their protest was concerted activity.

> It is sufficient to constitute concert of action if, from all of the facts and circumstances in the case, a reasonable inference can be drawn that the men involved considered that *they* had a grievance and *decided, among themselves,* that *they* would take it up with management. Id. at 12 (Emphasis added).

Thus, the evidence supported a finding of actual concerted activity.

In *ARO, Inc.* v *NLRB*, 596 F.2d 713 (6th Cir. 1979), a temporary employee was laid off due to lack of work and was subsequently refused reinstatement. The Board found concerted activity, although the employee enjoyed no rights under the collective bargaining agreement. The Sixth Circuit denied enforcement of the Board's decision stating:

> For an individual claim or complaint to amount to concerted action under the Act it must not have been made solely on behalf of an individual employee, but it must be made on behalf of other employees or at least be made with the object of inducing or preparing for group action and have some arguable basis in the collective bargaining agreement. 596 F.2d at 718.

The Second Circuit: In *Ontario Knife Co.* v *NLRB*, 637 F.2d 840 (1980), an employee walked off her job after a dispute with her supervisor concerning her workload. In rejecting the theory of implied concert of action, the Court held:

> We think that, except in the context of agreements between an employer and his employees which are themselves the product of concerted activities, as in *Interboro* §7, for reasons indicated above, should be read according to its terms. Not only must the ultimate objective be "mutual" but the activity must be "concerted" or, if taken by an individual . . . must be looking toward group action. 637 F.2d at 845.

The Third Circuit: In *Mushroom Transportation Company* v. *NLRB*, 330 F.2d 683 (1964), an employee who conversed with other employees in an effort to advance his personal interests was found not to be engaged in concerted activity:

> It is not questioned that a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least that it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees. 330 F.2d at 685.

The Fourth Circuit: In *Krispy Kreme Doughnut Corp.* v *NLRB*, 635 F.2d 304 (1980), an employee refused to forego a worker's compensation claim and was subsequently discharged. The Court rejected the implied concerted activity theory because there was no evidence that the employee's action was designed to induce group action or that the employee was acting on behalf of or as a representative of other employees:

> "Concerted activity" is an essential predicate, in effect a jurisdictional requirement, for Board action under the

> Act in a case such as this. The burden of establishing by proof such essential predicate to quasi-jurisdiction rests on the Board. 635 F.2d at 310.

The Fifth Circuit: In *NLRB* v. *Buddies Supermarket, Inc.*, 481 F.2d 714 (1973), an employee claimed that he was discharged for concerted activity in complaining about the method of employee compensation. The Court rejected the implied concerted activities theory stating:

> [T]here must be substantial evidence in the record showing that the employee was engaged in concerted activity for the purpose of mutual aid and protection and that the employer had some knowledge of this at the time of the discharge. The basic question here is whether Smith's efforts to gain more favorable contract terms for himself constitued protected concerted activity within the meaning of §7 of the National Labor Relations Act. The answer to this question lies in the distinction between concerted and non-concerted activity. If Smith's actions can properly be classified as individual griping or complaining, then it is clear that under the applicable authority the Board's decision must be reversed. Such conduct has never been considered protected. 481 F.2d at 717.

The Seventh Circuit: In *Pelton Casteel, Inc.* v *NLRB*, 627 F.2d 23 (1980), an employee's complaints about job rates and overtime were found not to constitute concerted activity. Although acknowledging that the complaints concerned working conditions affecting all employees, the Court stated: "It is also necessary, however, that the employee's actions themselves at least contemplate some group activity." 627 F.2d at 28.

The Eighth Circuit: In *NLRB* v *Dawson Cabinet Co.*, 566 F.2d 1079 (1977), an employee refused to work on a job unless she was paid a salary equal to male employees on

the job. Refusing to enforce the Board's Order, the Court stated:

> Thus, in order for employee activity to be protected under the Act, the activity must not only have a lawful objective and be carried out by lawful and proper means, but it must also be "concerted." 566 F.2d at 1082.

The Ninth Circuit: In *NLRB* v *Bighorn Beverage*, 614 F.2d 1238 (1980), an employee was allegedly fired for filing a safety complaint on his own, and for engaging with other employees in union organizing activity. Although substantial evidence supported the Board's finding that the employee was discharged for union organizing activity, the Court rejected the Board's finding of concerted activity with respect to his independent action:

> [T]he implied concerted action theory is a legal fiction presenting an unwarranted expansion of the definition of concerted action unsupported by a statutory basis. 614 F.2d at 1242.

District of Columbia: In *Kohls* v. *NLRB*, 629 F.2d 173 (1980) *cert. denied*, 450 U.S. 981, 67 L. Ed 2d 363, 101 S. Ct. 1390 (1981), an employee was fired for refusing to drive a truck he believed unsafe. In refusing to enforce the Board's Order, the District of Columbia Circuit indicated disfavor toward the *Interboro*[7] concept on which the Board initially premised its implied concerted activity doctrine and rejected the *Alleluia Cushion* theory:

> Given the rather clear language of sections 7 and 8(a)(1) of the NLRA, we have serious doubts about the validity of the *Interboro* doctrine. . . .
>
> Three facts lead us to the conclusion that, unlike the discharged employee in *Interboro*, Kohls was not en-

[7] 388 F.2d 495 (2nd Cir. 1967). See note 5 supra.

> gaged in protected concerted activity when he refused to perform his assigned work on November 12. First, Kohls did not assert an interest on behalf of anyone other than himself; indeed, there is no evidence to indicate that Kohls even attempted to warn other employees not to drive the truck that he believed to be unsafe. He simply asserted that the truck was not safe enough for *him*. In *Interboro* the discharged employee was found to have been speaking on behalf of other workers.
>
> . . . .
>
> Nevertheless, the main point here is that, whether or not he could have prevailed on this contract claim, Kohls was never engaged in "concerted activity" and, therefore UPS did not violate Section 8(a)(1) when it discharged Kohls for his refusal to perform assigned work. 629 F.2d at 177-178. (Emphasis added)

The decision in this case is so statutorily unwarranted that it is even at variance with other Sixth Circuit decisions. In *Jim Causley Pontiac* v *NLRB*, 620 F.2d 122 (6th Cir. 1980), an employee filed a complaint with the State Occupational Safety and Health Agency concerning paint fumes in the plant. The Court remanded the case for a determination as to whether the employer knew that the employee's activity was concerted in nature, adding:

> Such a remand would be unnecessary if we adopted the holding in *Alleluia Cushion Co.*, 221 NLRB 999, 91 L.R.R.M. 1131 (No. 162, 1965) . . .
> We are precluded, however, from adopting the holding in *Alleluia Cushion Co., supra*, by this court's recent decision in *ARO Inc. v NLRB*, 596 F.2d 713, (6th Cir. 1979), which rejected the theory of implied concert of action. 620 F.2d at 126.

Significantly, in light of the findings of fact and conclusions of law adopted in this case, the Sixth Circuit has now embraced the *Alleluia Cushion* doctrine and rejected its own decision in *Jim Causley*.

Until the instant case, the National Labor Relations Board's theory of implied concert of action has been consistently rejected by the Courts of Appeal.[8] The present case represents a clear example of the continuing effort by the Board to emasculate the concerted activity clause of Section 7 by making any activity related to any subject of working conditions, "concerted activity" regardless of the concerted nature of the employee's conduct. If approved, the decision would destroy Congress' intent that only "concerted" activity be protected by the Act. Moreover, employers would be subject to Section 8(a)(1) charges anytime they disciplined an employee who, acting alone, makes a protest about *any* work related condition potentially affecting other employees. This is wholly inconsistent with the intent of Congress, the judicial interpretation of the Act, and the wording of the Statute. Section 7 clearly states that the "activity" has to be "concerted" and not merely that the "activity" has to be for "mutual aid or protection."

The resolution of this conflict among the Circuits is essential for the establishment of the uniform application of the federal labor laws.

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[8] In addition to resolving the conflict between the Sixth Circuit and all other Circuits which have considered the issue, this case also affords the opportunity to resolve the conflict between the National Labor Relations Board and the Courts of Appeal. In order to vindicate their rights under the National Labor Relations Act, employers are continually forced to pursue costly appeals because of the Board's unwillingness to abandon its statutorily unwarranted position that Section 7 of the Act does not require concerted activity.

II. THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT AND THE CIRCUIT COURTS SINCE THE DECISION ENFORCES A DETERMINATION THAT AN EMPLOYER CAN VIOLATE §8(a)(1) OF THE ACT EVEN THOUGH THE EMPLOYER HAS NO KNOWLEDGE OF CONCERTED ACTIVITY.

The decision of the Administrative Law Judge, adopted by the Sixth Circuit, contains no finding of knowledge by the Petitioner that Singer was engaged in concerted protected activity.[9] The conclusion that Petitioner violated Section 8(a)(1) of the Act, despite the absence of knowledge, is inconsistent with prior decisions of this Court as well as the Circuit Courts of Appeal.

In *NLRB* v *Burnup & Sims Inc.*, 379 U.S. 21, 13 L.Ed.2d 1, 85 S. Ct. 171 (1964), this Court specifically set forth the test to be applied in determining Section 8(a)(1) violations:

> In sum, 8(a)(1) is violated if it is shown that the discharged employee was at the time engaged in protected activity, *that the employer knew it was such*, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct. 399 U.S. at 23 (Emphasis added.)

The Sixth Circuit's enforcement of the Board's finding of a Section 8(a)(1) violation, absent knowledge on the part of

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[9] Clearly this Court must recognize that without knowledge that the activity is concerted, an employer is placed in an untenable position since he cannot know whether his action violates the statute. Yet the Sixth Circuit in this case discards this vital element. Although the Administrative Law Judge found that Petitioner was aware of the work conditions which were a factor in Singer's walkout, there is no discussion or finding in the Administrative Law Judge's decision that Petitioner had any knowledge that Singer's "activity"—his walkout on March 1st—was concerted.

Petitioner, is also in conflict with the decisions of other circuit courts.

The Third Circuit: In *Tri-State Truck Service, Inc.* v. *NLRB,* 616 F.2d 65 (1980), the Third Circuit declined to hold that the employer violated Section 8(a)(1) of the Act by discharging the employees engaged in concerted activity, absent knowledge by the employer of the concerted activity. The Court stated:

> But section 8(a)(1) does not taint every employer act which may impact upon employees' protected activities. Such a broad reading would effectively erase the word "unfair" from the statute. Thus, both the Supreme Court and this court have recognized that the question of whether an employer's act violates section 8(a)(1) depends on the employer's motive. (citations omitted) *For an employer to have the requisite illicit motive, he must, of course, know of the employee's concerted activities; only then can the employer's actions be said to have been directed at restraining employee rights.* 616 F.2d at 69. (Emphasis added).

The Fifth Circuit: In *NLRB* v *Buddies Supermarket, Inc.*, 481 F.2d 714 (1973), the Fifth Circuit declined to find that an employer violated Section 8(a)(1) of the Act for discharging an employee who complained about the method of employee compensation. The Court, finding knowledge an indispensible element, stated:

> To support the Board's finding that Smith's discharge was unlawful, it is the black letter rule in this circuit and others that there must be substantial evidence in the record showing that the employee was engaged in concerted activity for the purpose of mutual aid and protection *and that the employer had some knowledge of this at the time of the discharge.*[10] 481 F.2d at 717. (Emphasis added).

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[10] See also *Southwest Latex Corp.* v *NLRB,* 426 F2d 50 (5th Cir. 1970).

The Seventh Circuit: In *Indiana Gear Works* v *NLRB*, 371 F.2d 273 (1967), the Seventh Circuit held that there was no violation of Section 8(a)(1) where an employer discharged an employee for ridiculing the company's president, since the employer had no knowledge that the activity was concerted:

> To support the Board's findings, there must be substantial evidence in the record that Packard was engaged in a concerted activity for the purpose of mutual aid or protection, and that the employer had knowledge of the concerted nature of the activity at the time it discharged the employee. 371 F.2d at 276.

In addition, the Sixth Circuit panel's decision in this case is inconsistent with prior Sixth Circuit decisions on the issue of employer knowledge. In *Jim Causley, supra,* the Sixth Circuit decided a case in which it was found that an employee was laid off because of his protected concerted activities. Although the Court concluded that the employee was in fact engaged in concerted activity, it remanded the case for a determination by the Board as to whether the employer had knowledge that the employee's activity was concerted:

> A more difficult issue is whether Causley Pontiac knew that the activity in question was concerted in nature and not an individual action on the part of a single employee. The Board made no specific finding that Causley Pontiac was aware that the activity in question was concerted, as opposed to individual. This Circuit has recently ruled that such knowledge is essential to the finding of a Section 8(a)(1) unfair labor practice. *Air Surrey Corp.* v *NLRB* 601 F.2d 256 (6th Cir. 1979).[11] 620 F2d at 125.

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[11] In *Air Surrey, supra,* the Court stated:

> It has long been the law in our circuit that an employer cannot be held in violation of section 8(a)(1) of the Act when it discharges an employee for activity which may in fact be protected under the Act *but the employer lacks knowledge of its protected character. NLRB* v *Westinghouse Electric Corp.*, 179 F.2d 507 (6th Cir. 1949). It is the employer's knowledge of an employee's protected activity and his subsequent discharge of the employee for engaging in such activity which violates the Act. 601 F.2d at 257. (Emphasis added.)

Simply put, even if the Administrative Law Judge's conclusion was legally correct that Singer was engaged in actual concerted activity when he walked off his job, Petitioner could still not have been found to have violated the Act since there was, in fact, no finding that Petitioner had any knowledge that Singer's walkout was concerted. Therefore, the decision of the Administrative Law Judge and the Sixth Circuit is inconsistent with prior decisions of this Court, the Sixth Circuit's own precedent and the precedent of other Circuit Courts of Appeals.

III. THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS IN THIS CASE IS CONTRARY TO THE STATUTE AND INCONSISTENT WITH PRIOR DECISIONS OF THIS COURT.

Section 7 of the National Labor Relations Act, states in relevant part:

> *Employees* shall have the right to self-organization, to form, join, or assist labor organizations, to bargain *collectively* through representatives of their own choosing, and to engage in other *concerted activities* for the purpose of *collective bargaining* or other *mutual* aid or protection, . . . (Emphasis added.)

It is well established that the term "concerted activity" refers to joint action or agreement among employees, not to spontaneous acts of an individual.[12] The legislative

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[12] In rejecting the implied concert theory, the Third Circuit stated in *NLRB* v *Northern Metal Co.*, 440 F.2d 881, 884 (1971):

> Webster's New International Dictionary (2 ed. 1947) defines "concert" as "*agreement* in a design or plan; *union* formed by mutual communication of opinions and views; accordance in a scheme; harmony; simultaneous action" and "concerted" as "*mutually* contrived or planned; agreed upon." *We do not believe the purpose of the Act would be served by expanding the limits of Mushroom to include activity which could be considered "concerted" only in a fictional sense.* (Emphasis added.)

In *Mushroom Transportation Co.* v *NLRB*, 330 F.2d 683, 685 (3d Cir. 1964), the Court concluded that the term, concerted action, encompassed activity "looking toward group action." Significantly, in the instant case there was no evidence that Singer was looking toward group action or that he was ever concerned about other employees in the plant.

policy of the National Labor Relations Act is to promote collective activity among employees, due to the perceived inequality of bargaining power between employers and employees, by protecting workers' freedom of association, self-organization, and representation.[13]

This Court has recognized that the purpose of the Act is to promote collective, joint action among employees.[14] The

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[13] Section 1 of the Act, 29 U.S.C. 151, states, in relevant part:

> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce . . .
>
> . . . .
>
> It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

It is clear from the policy of the Act that Congress was not concerned with protecting the spontaneous actions of an individual acting outside the context of collective bargaining.

[14] *Eastex, Inc.* v *NLRB*, 437 U.S. 556, 57 L.E.2d 428, 98 S. Ct. 2505 (1978), involved the right of employees to distribute a union newsletter in non-working areas of their employer's property during non-working time. Examining the legislative history of the Act, this Court noted:

> Congress modeled the language of §7 after that found in §2 of the Norris-LaGuardia Act, 47 Stat 70, 29 USC §102 [102 USC §102] which declares that it is the public policy of the United States that workers "shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of . . . representatives or in self-organization or in other concerted activites for the purpose of collective bargaining or other mutual aid or protection . . ." See S Rep No. 573, 74th Cong., 1st Sess., 9 (1935); H.R. Rep. No. 1147, 47th Cong., 1st Sess., 15 (1935). This section of the Norris-LaGuardia Act expresses Congress' recognition of the "right

(Continued on page 21)

Alleluia Cushion implied concert theory was created by the Board without any legislative support whatsoever, and in fact in contravention of Congress. In *ARO, Inc.* v *NLRB*, 596 F.2d 713 (1970), the Sixth Circuit recognized that there was no legislative support for the Board's creation of the implied concert theory when an employee has no rights under a collective bargaining agreement:

> The Board's decision and order creates, in effect, grievance rights for temporary/probationary employees, by the filing of an unfair labor practice, which do not exist under the collective bargaining agreement. Nothing in the language of the Act, nor its legislative history, evidences an intent on the part of Congress so to intrude into the day-to-day operation of an employer's business. 596 F.2d at 718.

Simply put, there is no support anywhere in the Act for the expansive interpretation of Section 7 of the Act set forth in the Board's *Alleluia Cushion* doctrine.

In *Burnup & Sims, supra,* this Court outlined the essential elements which must be established by the Board before an employer may be found to have violated Section 8(a)(1). The two most important elements are that the employer be engaged in protected activity and that the employer know that the employee is engaged in such activity. Except for the decision in this case, this standard has been applied by all Circuit Courts of Appeal.[15]

(Continued from page 20)

of wage earners to organize and to act jointly in questions affecting wages, conditions of labor, and *the welfare of labor generally . . .*" S. Rep. No. 163, 72d Cong., 1st Sess., 9 (1932) (emphasis supplied). Similar language is found in §7(a)(1) of the National Industrial Recovery Act of 1933, 48 Stat. 198; §1 of the National Labor Relations Act, 49 Stat. 449-450, 29 U.S.C. §151 [29 U.S.C. §151] (declaration of policy); and §2(a) of the Labor Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U.S.C. §401(a) (findings, purposes, and policy). 437 U.S. at 566, n.14.

[15] See discussion, Part II, supra, where the element of employer knowledge of protected activity is discussed in greater detail.

In contrast, the test applied by the Board and adopted by the Sixth Circuit panel in this case is:

1. The employee has engaged in some activity relating to a subject theoretically of some concern to other employees; and

2. Fellow employees have not disavowed such activity.

This test completely abandons this Court's test as outlined in *Burnup & Sims, supra*. The principle applied in the instant case does not require *any* finding by the Board that the employee is engaged in concerted protected activity nor does it require *any* finding by the Board that the employer have knowledge of the employee's concerted protected activity. Significantly, in addition to these "standards", the Board has also imposed an affirmative obligation upon an employer to prove that his other employees have *disavowed* the spontaneous independent actions of one employee.[16] This affirmative obligation obviously represents an unwarranted intrusion by the Board into the day-to-day operations of American business and a burden not permissible under the Act.

IV. THE DECISION OF THE SIXTH CIRCUIT RAISES IMPORTANT QUESTIONS OF THE UNIFORM INTERPRETATION AND ADMINISTRATION OF FEDERAL LABOR LAWS.

The controversy engendered by the theory of implied concerted activity creates continuing confusion concerning the essential element of the Act, "concerted activity."

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[16] By virtue of this doctrine, an employer is now unable to take any action with respect to he spontaneous acts of an individual employee, until he polls each and every one of his other employees to determine if the individual acts of the employee have been disavowed. To show the absurdity of the Board's position, if only one employee in the workplace does not disavow the activity, the Board would apparently find that the employee's action is concerted. Clearly, such an imposition by the Board has no support in the language of the statute. This obligation on employers burdens and obstructs commerce in contravention to the policy of the National Labor Relations Act.

Any determination of Section 7 rights by the Board or Courts depends upon the definition of concerted activity.[17] Thus, the issue before this Court is not merely whether to review an aberrant decision of a Court of Appeals but whether to resolve a continuing controversy which has a daily impact on all employers and employees.[18]

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[17] This controversy over implied concerted activity has now raised questions about the application of *NLRB* v *Weingarten, Inc.*, 420 U.S. 251, 43 L.Ed.2d 171, 95 S Ct 959 (1975). In *Weingarten*, an employer was held to have violated Section 8(a)(1) by refusing an employee's request to have a union representative present during a disciplinary interview with her employer. This Court held that such action by an employee falls within the literal terms of the Act.

The Fifth Circuit in *Anchortank, Inc.* v *NLRB*, 618 F.2d 1153 (1980) has inferred from *Weingarten* that the *Interboro* doctrine (discussed in Note 6 *supra)* had been adopted by this Court:

> In *Weingarten, supra*, the Supreme Court has seemingly adopted the *Interboro* approach. In concluding that an employee engages in concerted activity when he seeks union representation at an interview which he reasonably fears may lead to discipline, the Court focused entirely on the effects such representation on the bargaining unit. 618 F.2d at 1161.

The Petitioner submits that *Weingarten* stands only for the proposition that an employer cannot block efforts by an employee seeking to act in concert with his union representative. This erroneous interpretation of the import of *Weingarten* further evidences the need for this Court to to grant a writ of certiorari.

[18] The continuing confusion over the theory of implied concerted action is evidenced by recent decisions of the Sixth Circuit. In *United Parcel Service* v *NLRB*, 654 F.2d 12 (6th Cir. 1981), the Court did not find substantial evidence to support the Board's determination that an employee acting on his own was exercising a contractual right in refusing to perform an arguably dangerous duty. The Court found that his actions were motivated by a personal conflict between himself and his supervisor. Although the Court apparently refused to apply an implied concert of action theory to the facts of that case, there is no discussion of *Alleluia Cushion* or *Interboro* in the court's opinion.

Further support for the Petitioner's contention that the Sixth Circuit has now adopted the theory of implied concerted activity, absent a collective bargaining agreement, may be found in *NLRB* v *Lloyd A. Fry Roofing Company of Delaware*, 651 F.2d 442 (6th Cir. 1981). There the Sixth Circuit cited *Alleluia Cushion* with approval stating:

The Board has continued to extend the parameters of its *Alleluia Cushion* theory to encompass any activity which theoretically concerns a condition of employment. Despite the hostile reception this theory has received from the Courts of Appeals, the Board remains intransigent:

> [W]e adhere to our position as set forth in *Alleluia Cushion Co., Inc.*, 221 NLRB 999 (1975) and we respectfully decline to adopt the Ninth Circuit's rejection of that principle until such time as the Supreme Court may determine the issue. *Hotel and Restaurant Employees and Bartenders Union*, 252 N.L.R.B. No. 158, slip op. at 2.

Until the instant case, this Court has not had the need nor responsibility to act since the Courts of Appeals have uniformly rejected this statutorily unwarranted theory.[19] The cost of this continuing controversy between the Board and the Courts, however, has been borne by the employers. The persisting confusion over interpretation of concerted activ-

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Additionally, an employee's presentation of job related grievances aimed at achieving employer compliance with governmental regulations affecting working conditions is for the mutual aid and protection of employees. *Socony Mobile Oil Co.* v *NLRB*, 375 F.2d 662 (2nd Cir. 1966). *Alleluia Cushion Co.*, 221 NLRB No. 999 (1975). Applying these principles, we hold that Varney was engaged in concerted activity protected by Section 7 of the Act. 651 F.2d at 445.

It should be recognized that in *Fry Roofing*, unlike the instant case, there was evidence that the employee had articulated his concerns at a meeting between fellow employees and management. Although the Court cited *Alleluia Cushion*, the Court did not need to rely upon the implied concert theory since there was evidence of actual concerted protected activity.

[19]Significantly, in *Kohls* v *NLRB*, 629 F.2d 173 (D.C. Cir. 1980), *cert. denied*, 450 U.S. 931, 67 L. Ed.2d 363, 101 S. Ct. 1390 (1981), this Court refused to grant certiorari, thereby implicitly accepting the decision of the District of Columbia Circuit which rejected the implied concert of action theory. However, now that the Board's position has received some judicial support, it is necessary for this Court to resolve the issue and foreclose the Board from bringing a parade of cases in the hopes of getting another favorable determination to buttress its beleaguered *Alleluia Cushion* doctrine.

ity which affects the daily actions of all employers and employees must be ended.

The divergence of authority created by the Sixth Circuit's decision in this case cannot be permitted to exist in federal labor law.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that a writ of certiorari should be granted.

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Appendix

Appendix A

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 79-1594

THERMOFIL INCORPORATED
Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD
Respondent

ORDER AND DISSENTING OPINION

FILED JUNE 11, 1981

BEFORE WEICK, ENGEL AND JONES, CIRCUIT JUDGES

Appendix A

Upon consideration of the briefs, record and arguments of counsel, we are of the opinion that substantial evidence supports the order of the Board entered on September 14, 1979, reported at 244 NLRB No. 171, finding that petitioner Thermofil Inc. violated Section 8(a)(1) of the Act by terminating employee Thomas Singer and ordering his reinstatement with back pay, and said order will be enforced.

Enforcement of the Board's order is therefore granted. Judge Engel dissents.

ENTERED BY ORDER OF THE COURT

(s) JOHN D. HEHMAN
Clerk

ENGEL, Circuit Judge, dissenting. I would deny enforcement because there is, in my opinion, no substantial evidence to support the finding that the action of employee Thomas Singer was concerted. Rather than showing that he was acting on behalf of or as a representative of the other employees, the evidence shows at best that his complaints were shared by others but that his individual conduct was entirely spontaneous. This case, therefore, falls squarely within the holding of our circuit in *N.L.R.B.* v *Guernsey-Muskingum Electric Coop, Inc.*, 285 F.2d 8 (6th Cir. 1960). *See Aro, Inc.* v. *N.L.R.B.*, 596 F.2d 713 (6th Cir. 1979).

APPENDIX B

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

No. 7-CA-14973
224 NLRB No. 171

THERMOFIL INCORPORATED

and

THOMAS D. SINGER, an individual

DECISION AND ORDER
September 19, 1979

Appendix B

On May 14, 1979, Administrative Law Judge Almira Abbot Stevenson issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting and answering brief. Respondent thereupon filed a reply brief.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge and to adopt her recommended Order, as modified herein.[3]

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[1] The General Counsel filed a motion to strike certain portions of Respondent's reply brief. Respondent filed a response to the General Counsel's motion and requested special leave to submit the contested material as a reply to the General Counsel's answering brief. We hereby grant the General Counsel's motion to strike pp. 7-24 of Respondent's reply briefs as not limited to the questions raised in the cross-exceptions. See Sec. 102.46(f)(1) of the National Labor Relations Board Rules and Regulations, Series 8, as amended. Respondent's motion for special leave is hereby denied.

[2] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing her findings.

[3] In light of *Hickmott Foods, Inc.*, 242 NLRB No. 177 (1979), we find that the narrow cease-and-desist language, "in any like or related manner," is adequate to remedy the violation here. Accordingly, we shall modify the recommended Order and notice.

Appendix B

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Thermofil, Inc., Ypsilanti, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(b):

"(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington D.C. September 14, 1979

John H. Fanning, *Chairman*

(SEAL) Howard Jenkins, Jr., *Member*

John C. Truesdale, *Member*

NATIONAL LABOR RELATIONS BOARD

Appendix B

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT terminate or otherwise interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act, as amended.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Thomas D. Singer immediate and full reinstatement to his former job or, if that job, no longer exists, to a substantially equivalent job, without prejudice to his seniority or other rights and privileges.

WE WILL make Thomas D. Singer whole for any loss of pay he may have suffered as the result of his termination on March 2, 1978, plus interest.

THERMOFIL, INC.
(Employer)

Dated By

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Patrick V. McNamara Federal Building, Room 300, 477 Michigan Avenue, Detroit, Michigan 48226, Telephone 313-226-3244.

APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

No. 7-CA-14973

THERMOFIL INCORPORATED

and

THOMAS D. SINGER, an individual

DECISION
May 14, 1979

Appendix C

Statement of the Case

ALMIRA ABBOT STEVENSON, Administrative Law Judge: This case was heard in Detroit, Michigan, on October 30 and 31, 1978. A copy of the charge, filed on March 20, 1978, was served on the Respondent March 22, 1978. The complaint was issued May 25, 1978 and amended at the hearing. The Respondent duly filed an answer, which was also amended at the hearing.

The issue is whether or not the Respondent violated Section 8(a)(1) of the National Labor Relations Act by discharging Thomas Singer because of his concerted protected protests about job safety and working conditions. For the reasons fully set forth below, I conclude that the Respondent violated the Act as alleged.

Upon the entire record,[1] including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the Respondent and the General Counsel, I make the following:

Findings of Fact and Conclusions of Law

I. Jurisdiction

The Respondent, a Michigan corporation, maintains its principal office and place of business at 815 North Second Street, Brighton, Michigan. The Respondent maintains other plants located at 103 South River Street, Ypsilanti, Michigan, and 884 Railroad Street, Ypsilanti, Michigan, here involved. The Respondent is engaged in the manufacture, sale, and distribution of fiberglass reinforced

[1] The General Counsel's motion to correct official record is granted in the absence of objection. No reliance is placed on an otherwise unidentified copy of a shift-production report dated March 1, 1978 submitted by the Respondent after the close of the hearing.

plastics and related products. During the year ending December 31, 1977, the Respondent purchased goods and materials valued in excess of $50,000 which were transported and delivered to its Railroad Street plant directly from points outside Michigan. The Respondent stipulates, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. Unfair Labor Practices[2]

A. Facts

Thomas Singer, the Charging Party, was employed as an extruder-machine operator at the Respondent's Railroad Street fiberglass and plastics manufacturing plant in Ypsilanti, Michigan from April 27, 1977 until March 1, 1978. The plant employs a complement of approximately 55 production employees. The Respondent admits and I find that the following individuals were its supervisors and agents during material times:

Robert Darga—Vice President
John LeClair—Manufacturing Manager
Leonard Federer—General Foreman
Richard Vukmirovich—General Foreman
Stan Johnson—Foreman
Bryce Johnson—Foreman

The extruder machines, to one of which Singer was assigned, produce small solid fiberglass and plastic pellets from melted mixes. They also produce a considerable amount of scrap which does not meet specifications and must be trucked to another building for grinding and eventual re-mixing and melting. The scrap is stored in old cardboard boxes of approximately 3½ or 4 feet cubed in size and 100-800 pounds in weight. The Respondent has periodic

[2] Except where credibility issues are specifically discussed, the facts are substantially undisputed.

problems storing the scrap boxes and stacks them 2, 3, and sometimes 4 boxes high in the area where the extruder-machine operators work. When this has occurred, there have been many employee complaints to management about being crowded by the boxes and not having enough room to work. The cramped conditions caused by stacked scrap boxes was discussed by employees and management at a quality-control meeting as far back as the fall of 1977.

When Singer reported for work on the 2-8 p.m. shift March 1, 1978, the situation was worse than it had ever been, because the grinder machine was broken down and more scrap boxes than usual were being held in the extruder building until the grinder could be repaired. Alongside extruder No. 4, to which Singer was assigned, as well as elsewhere in the building, the scrap boxes were stacked out of alignment in a sloppy manner, some were broken and leaking contents, and some were overpacked causing those on top of them to rock and lean. Although I do not credit Singer that any of the boxes had actually fallen up to this time,[3] they clearly constituted a hazard to the safety of the employees, as well as adversely affecting the working conditions of Singer and other employees, as subsequent events proved.[4]

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[3] Singer testified that two boxes fell from a stack on the afternoon of March 1, and that boxes had fallen into aisles on previous occasions. He said that on March 1 the boxes fell 10 feet in front of James Herndon who was operating extruder machines No. 5 and 6 alongside No. 4, and that other named employees had witnessed the previous falls. However, neither Herndon, who testified, nor the other named employees was asked to corroborate Singer in this respect. In the absence of such corroboration, as Singer was upon occasion inconsistent and self-contradictory, and in view of the absence of evidence that any falls were witnessed by or reported to management, I do not credit Singer in this respect.

[4] In view of the substantially undisputed evidence as to the size, weight, and condition of the scrap boxes and the height and manner of their stacking, as well as subsequent events, I do not credit the testimony of general foremen Vukmirovich and Federer that the stacked boxes did not constitute a danger to the employees. Vice President Darga in effect conceded, substantially as employee James Herndon and Michigan Safety Officer Robert Tavernier testified, that the stacks would not withstand a jolt.

Appendix C

At the start of his shift on March 1, 1978, Singer was assigned to effect a changeover on extruder No. 4 to a mix which was a clear natural color different in content from the black mix which had been running through the machine before then. The changeover required Singer to clear the machine of the molten black plastic by letting it run on the floor where it gradually cooled into piles 2 to 2½ feet in diameter and 4 to 6 inches thick. These cooling piles, or goobers, the empty boxes provided to store them in after they had hardened, and the old scrap boxes stacked along side the extruder hampered Singer's ability to move about his machine to make the adjustments necessary to run the new material, and he was unable to get the extruder into proper operation again. The new material became too hot, the water-cooling system failed to correct the temperature, and hot strands of plastic became wrapped around the conveyor belt and the pelletizer became clogged with the hot strands. Singer shut the machine off and sought out Foreman Bryce Johnson, and told him the place was fucked up and he could not work; that Johnson had seen the boxes stacked out there leaning and so close to the machine there was no room to work; that the material was too hot and the pelletizer was plugged up. Johnson offered to help Singer, but Singer said no, the place was a mess, he was going home, and to have them call him when the place was cleaned up. With that, Singer left the plant at about 4:30 p.m.[5]

[5] The facts as to this conversation are based on the most likely aspects of the testimony of Singer, Johnson, and employee Douglas Fraley with whom Johnson subsequently discussed it. The Respondent's counsel claimed to have seen Johnson's entry in the foreman's log book regarding this conversation before the page on which it was written disappeared. Although he thus may have been in a position to corroborate to some extent Johnson's testimony that Singer did not mention the stacked boxes, counsel declined the General Counsel's invitation to take the stand, and refused my instructions that he do so under a subpoena served on him by the General Counsel. In these

(Continued on page 12a)

Johnson proceeded to Singer's work place, cleared away the goobers, cleared the pelletizer, adjusted the machine, and operated it until the end of the shift at 8 p.m.

The next day Assistant General Foreman Leonard Federer pulled Singer's timecard when he failed to punch in at 2 p.m. Vice President Robert Darga testified that he received information from Foreman Johnson and Manufacturing Manager John LeClair that Singer had left the plant because of frustration over difficulties he encountered running his machine, and because of what Singer called the mess in his work area, part of which Singer had made himself with the goobers in the aisle and, Darga continued, part of which "I assumed he was referring to some of the cluttered conditions" created by the stacked scrap boxes. Based on Singer's refusal of Foreman Johnson's offer to help him clean up, his walk out, and a recent deterioration in his work performance, Darga testified, he instructed LeClair to terminate Singer.

Sometime after 2 p.m., Singer, having received no call, went to the plant and asked LeClair whether he still had a job. LeClair responded that Singer had quit; Singer denied it, saying he would be glad to return to work if the place was cleaned up.

In his claim for unemployment compensation, filed that day, Singer alleged "the work area was cluttered to the

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(Continued from page 11a)

circumstances and as Vice President Darga acknowledged awareness that Singer had mentioned the "cluttered conditions" caused by the stacked boxes at the time of his walk out, Johnson's testimony to the contrary is not credited. The Respondent's contention that Singer raised the safety issue only after March 5 when he heard that a box had fallen on employee Strosier the night after Singer walked out is without merit. As found below, Singer's unemployment-compensation claim, filed on March 2 before the accident to Strosier, reaffirmed his claim of hazardous working conditions. As Singer was not sure he told Johnson about the boxes having fallen and as I have found that they have not, I do not credit Singer in his respect.

point he could not set up materials and operate his machine" and that "safety precautions and use of safety equipment are not enforced." Darga responded to this claim on March 14, 1978 to the following effect:

> Thomas stated he would not work because of the cluttered working conditions. The conditions were temporarily congested but were not to the point that the machines could not be operated. There was no reason for Thomas to walk off the job. In light of this and previous attitude problems, it was decided that Thomas be terminated effective the date he walked off the job.
>
> We do take all necessary safety precautions and use safety equipment, as substantiated by MIOSHA inspection in January of this year.

That night at approximately midnight, a scrap box fell from the top of a stack on employee Terry Strosier while he was operating a hi-low near extruder machine No. 4, injuring him and requiring medical attention. Douglas Fraley and Mitchell Watts immediately turned off their machines and informed their foreman Stanley Johnson, they "weren't going to work anymore with that mess the way it was." Stanley Johnson sent for General Foreman Richard Vukmirovich. Fraley testified without dispute that he told Vukmirovich, "Tom [Singer] had just left because he was afraid of these boxes and this mess, and afraid of one falling on him and now that one fell on Terry, one could fall on me. And there was no way we were going to work like that." Fraley and Watts left the plant. The following day, March 3, Vice President Darga got in touch with them because, he testified, they made a complaint regarding safety which he believed was made in good faith after the accident to Strosier. Darga explained the reason for the stacking of scrap boxes and promised to clear the building. The two employees accepted his promise and returned to work.

The following week Singer visited Vice President Darga's office and asked Darga if he had been fired. Darga told him no, he had left voluntarily and based on his departure he had been terminated. Singer told Darga the plant was unsafe.

Pursuant to a telephoned complaint, the Michigan Bureau of Safety and Regulation (MIOSHA) inspected the Railroad Street plant March 16, when conditions in the extruder building were substantially as they were on March 1 and March 2, and cited the Company for among other things failing to "Maintain stacking of material in a manner which does not create a hazard. (Boxes of scrap material in aisleway near #4)."

B. Conclusions

There is no merit in the Respondent's accusations that Singer quit. He denied it, and repeatedly expressed his willingness to return to work when the place was cleaned up. It is clear that Singer walked off his job in part as a protest against the stacked boxes which were leaning in a hazardous manner and created crowded working conditions. It is also clear that these were determinative factors triggering Vice President Darga's decision to terminate him. Thus, although Singer's work performance had apparently been deteriorating for some time, and he had even left his machine in frustration over its operation before, he was not terminated or even disciplined for those transgressions. Moreover, Respondent was well aware that the stacked boxes created crowded and hazardous conditions as other employees had complained about the crowding and the danger was evident. The Respondent was also aware that these conditions were a factor in Singer's walkout because he made this plain to Foreman Johnson at the time and Vice President Darga acknowledged that the boxes were part of the mess to which Singer referred. It was obvious also, as Singer testified, that there was no way Foreman

Johnson's offer to help him clean up the mess could have solved the problem of the stacked boxes as it would have been impossible for the two of them to accomplish that feat. Nor does it signify that the Respondent did not terminate employees Fraley and Watts when they walked out in protest over the same hazard. Unlike Singer, they did not refuse to return until the place was cleaned up but returned under the conditions laid down by Darga of a promise to do so in the future. In any event, it has long been recognized that an employer's failure to discharge all similarly situated employees does not negative unlawful motivation for the discharges shown.[6]

The stacking of heavy boxes close to work stations to a formidable height in an unstable manner affected the efficiency and safety of all employees who worked in the extruder building. Singer's protest was therefore a protest about conditions of employment which were of concern to all employees subjected to those conditions. It was accordingly protected concerted activity even absent a showing that other employees joined in his walkout where, as here, there is no evidence that fellow employees disavowed the substance of his complaint.

I conclude that the Respondent's termination of Thomas Singer on March 2, 1978 in part because of his protected concerted activity in engaging in a walk out in protest over hazardous and crowded working conditions interfered with, restrained, and coerced employees in the exercise of the rights guaranteed them by Section 7, and it thereby violated Section 8(a)(1) of the Act, as alleged in the complaint.[7]

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[6] See *Hyster Company*, 198 NLRB 192, 202.

[7] *Pink Moody, Inc.*, 237 NLRB No. 7; *St. Joseph's High School*, 236 NLRB No. 213; *Akron General Medical Center*, 232 NLRB No. 140; *Air Surrey Corporation*, 229 NLRB 1064; *Dawson Cabinet Company, Inc.*, 228 NLRB 290; *Alleluia Cushion Co., Inc.*, 221 NLRB 999. Accord, *ARO, Inc., 227 NLRB 243. Tabernacle Community Hospital & Health Center*, 233 NLRB No. 208 and *Standard Brands Incorporated*, 196 NLRB 1006, relied on by the Respondent, are distinguishable on their

(Continued on page 16a)

III. Remedy

In order to effectuate the policies of the Act, I recommend that the Respondent be ordered to cease and desist from the unfair labor practices found and, in view of the nature thereof, to cease and desist from infringing in any manner on its employees' rights guaranteed by the Act. *N.L.R.B.* v. *Entwistle Mfg. Co.*, 120 F. 2d 532 (C.A. 4).

Having found that the Respondent interfered with, coerced, and restrained its employees by discharging Thomas Singer on March 2, 1978, in order to effectuate the policies of the Act I recommend that the Respondent be ordered to take certain affirmative action including that it offer him immeidate and full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent job, without prejudice to his seniority or other rights and privileges, and to make him whole for any loss of earning suffered by reason of the Respondent's unlawful conduct against him, in accord with the Board's Decision and Order in *Abilities and Goodwill, Inc.*, 241 NLRB No. 5. Backpay shall be computed as provided in *F. W. Woolworth Company*, 90 NLRB 289. Interest shall be paid on all backpay due. *Florida Steel Corporation*, 231 NLRB 651; *Isis Plumbing & Heating Co.*, 138 NLRB 716.

Upon the foregoing findings of fact and conclusions of law and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[8]

(Continued from page 15a)

facts. To the extent that my decision herein is inconsistent with *American Art Clay Company, Inc.* v. *N.L.R.B.*, 328 F. 2d 89 (C.A. 7), *Dobbs Houses, Inc.* v. *N.L.R.B.*, 325 F. 2d 531 (C.A. 5), *N.L.R.B.* v. *Jamestown Veneer and Plywood Corporation*, 194 F. 2d 192 (C.A. 2) and other cases in which the Board was reversed on somewhat similar issues, I am required to follow the Board. *Iowa Beef Packers, Inc.*, 144 NLRB 615.

[8] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommmended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Appendix C

ORDER

The Respondent, Thermofil, Inc., Ypsilanti, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Terminating or otherwise interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action, which is necessary to effectuate the policies of the Act:

(a) Offer Thomas D. Singer immediate and full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent job, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings in the manner set forth in the section of this Decision entitled Remedy.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other documents necessary to analyze and compute the amount of backpay due under this recommended Order.

(c) Post at its Railroad Street, Ypsilanti, Michigan, facility copies of the attached notice.[9] Copies of said notice

[9] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

on forms provided by the Regional Director for Region 7, after being duly signed by the Respondent's authorized representative, shall be posted by it immediately upon receipt thereof and maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this recommended Order, what steps have been taken to comply herewith.

Dated, Washington, D. C. May 14, 1979

(s) ALMIRA A. STEVENSON
Administrative Law Judge

Appendix C

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT terminate or otherwise interfere with, restrain, or coerce employees in the exercise of the rights guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed by Section 7 of the Act.

WE WILL offer to Thomas D. Singer immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to his seniority or other rights and privileges.

WE WILL make whole Thomas D. Singer for any loss of pay he may have suffered as the result of his termination on March 2, 1978, plus interest.

THERMOFIL, INC.
(Employer)

Dated By
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Patrick V. McNamara Federal Building, 477 Michigan Avenue - Room 300, Detroit, Michigan 48226 (Tel. No. (313) 226-3244).

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 79-1594

THERMOFIL INCORPORATED
Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD
Respondent

ORDER DENYING PETITION FOR REHEARING
filed September 14, 1981

Before Weick, Engel and Jones, Circuit Judges

The majority of the active judges of this court not having voted in favor of en banc consideration of the petition for rehearing, said petition for rehearing was referred to the panel for determination.

Upon consideration, it is ORDERED that said petition for rehearing be and it is hereby denied.

Judge Engel dissents.

ENTERED BY ORDER OF THE COURT

(s) JOHN P. HEHMAN
Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 79-1594

THERMOFIL INCORPORATED
Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD
Respondent

ORDER STAYING MANDATE
filed October 21, 1981

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT.

(s) JOHN P. HEHMAN
Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 79-1594

THERMOFIL INCORPORATED
Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD
Respondent

ORDER FURTHER STAYING MANDATE

(Filed: December 4, 1981)

Appendix F

Upon consideration of the petitioner's motion for further stay of the mandate pending application for certiorari,

It is ORDERED that the motion be and it hereby is granted and the mandate is stayed until December 23, 1981.

ENTERED BY ORDER OF THE COURT.

(s) JOHN P. HEHMAN
Clerk

Opposition

Office - Supreme Court, U.S.
FILED
FEB 20 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1103

In the Supreme Court of the United States

OCTOBER TERM, 1981

THERMOFIL, INCORPORATED, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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Washington, D.C. 20570

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that petitioner violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by terminating an employee for leaving the workplace due to a hazardous condition that previously had been the subject of numerous employee complaints to management.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1103

THERMOFIL, INCORPORATED, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a) is reported at 650 F.2d 858. The decision and order of the National Labor Relations Board (Pet. App. 3a-19a) are reported at 244 N.L.R.B. 1056.

JURISDICTION

The judgment of the court of appeals was entered on June 11, 1981, and a timely petition for rehearing was denied on September 14, 1981 (Pet. App. 20a-21a). The petition for a writ of certiorari was filed on December 12, 1981. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (29 U.S.C. 151 *et seq.*) are set forth in the petition (Pet. 2).

STATEMENT

1. Petitioner is engaged in the manufacture of fiberglass, reinforced plastics, and related products (Pet. App. 8a-9a; A. 5, 8).[1] A number of employees, including Thomas Singer, operated "extruder machines," which produce small, solid fiberglass and plastic pellets from melted mixes. Those machines also produce a considerable amount of scrap plastic that does not meet specifications (Pet. App. 9a; A. 14-15, 23-24, 197-200). The scrap was stored in old cardboard boxes weighing 100 to 800 pounds until it was eventually transported to another plant for grinding and re-mixing (Pet. App. 9a; A. 25-27). Petitioner made a practice of stacking these boxes, sometimes as many as four boxes high, in the area in which operators of the extruder machines worked (Pet. App. 9a-10a; A. 26-27, 137).

Many employees complained to management that they were crowded by the stacked boxes and did not have enough room to work safely. Management and the employees discussed this issue at a meeting in the autumn of 1977 (Pet. App. 10a; A. 49, 41). In February 1978, Singer and other employees, including Douglas Fraley and Mitchell Watts, discussed the problem among themselves and complained to management that stacks of scrap boxes next to the extruder machines were creating dangerous working conditions (Pet. App. 10a; A. 45-48, 143-145, 226, 274, 276). Singer complained to his foreman, Bryce

[1] "A." refers to the appendix in the court of appeals.

Johnson, to foreman Leonard Federer, to general foreman Richard Vukmirovich, and to manufacturing manager John Le Clair about the lack of working space caused by the scrap boxes stacked next to extruder machine No. 4, which he operated (A. 45-48, 294). In mid-February, employee Douglas Fraley, who operated that same machine on the shift following Singer's, began complaining daily about the same problem to his foreman, Stan Johnson, and to Vukmirovich (A. 143-145, 294). Employee Mitchell Watts joined with Fraley in lodging these complaints (A. 144-145). Fraley recalled that every time he complained about the boxes his supervisors would reply, "[W]ell, quit. We'll get somebody new. It really doesn't matter" (A. 145). Foreman Bryce Johnson admitted that in February the crowded working conditions caused by the poorly stacked scrap boxes became "a lot worse" and were the subject of numerous employee complaints (A. 274-276). Company Vice President Darga admitted that he had received such complaints from a number of employees (A. 226).

On March 1, 1978, conditions were worse than ever before. Petitioner's grinding machine had broken down, scrap was accumulating, and therefore an especially large number of boxes were stacked in the work areas (Pet. App. 10a; A. 28, 30, 58, 137-138, 146, 234). Near the No. 4 extruder machine, where Singer worked, and elsewhere in the plant, the boxes were stacked out of alignment; some were broken and leaking; some were overpacked; and the boxes at the tops of the stacks were rocking and leaning (Pet. App. 10a; A. 26-28, 137-138, 251-252, 272-276). At the start of his 2 p.m. to 8 p.m. shift, Singer was instructed to effect a changeover on his machine from the black mix that had been run earlier

to a clear natural color (Pet. App. 11a; A. 29-30, 248). This procedure required Singer to clear the machine of the molten black plastic by letting the plastic run on the floor, where it formed cooling piles or "goobers" 2 to 2½ feet in diameter and 4 to 6 inches thick (Pet. App. 11a; A. 31, 249). Singer began the operation but found that the stacked scrap boxes, along with the cooling piles and the empty boxes provided for storing the "goobers" after hardening, interfered with his ability to move about the machine to make the necessary adjustments. As a result, the new material fed into the machine became overheated, the water-cooling system failed to correct the temperature, hot strands of plastic became wrapped around the conveyor belt, and the "pelletizer" became clogged with the hot plastic strands (Pet. App. 11a; A. 28, 30-32, 35-36, 105). Singer shut down the machine and sought out his foreman, Bryce Johnson. He explained the situation and the hazard, and told Johnson that he was not going to work until the hazard was removed. Singer then left the plant at 4:30 p.m. (Pet. App. 11a; A. 36-37, 91-92, 134-136, 160.)

The next day Singer appeared at the plant at the start of his shift but was informed that he had been terminated on the ground that he had "quit." Singer denied that he had quit and stated that he would return if the place was "cleaned up." (Pet. App. 12a; A. 38-42, 93.)

Later that day, on the shift following Singer's, a scrap box near the No. 4 machine fell on employee Terry Strosier, injuring him and requiring medical attention at a hospital (Pet. App. 13a; A. 113, 140-143). Employees Fraley and Watts immediately shut down their machines and told their foreman that they were not going to work near the hazardously

stacked boxes. General Foreman Vukmirovich arrived on the scene, and Fraley informed him that "there was no way we were going to work like that." (Pet. App. 13a; A. 142-143.) Fraley and Watts then walked out. They returned to work the next day after petitioner promised to remove the hazard. (Pet. App. 13a; A. 152, 167, 154-155, 237.) However, petitioner continued to refuse to reinstate Singer (Pet. App. 14a; A. 222).

About two weeks later, the plant was inspected by the Michigan Bureau of Safety and Regulation. The conditions near the extruder machines were substantially as they had been on March 1 and 2, and the Bureau cited petitioner for maintaining a hazardous condition by its stacking of the scrap boxes. (Pet. App. 14a; A. 115-116, 121-122, 128, 234.)

2. Adopting the decision of the administrative law judge, the National Labor Relations Board found that petitioner had violated Section 8(a)(1) of the Act (29 U.S.C. 158(a)(1)) by terminating Singer "because of his protected concerted activity in engaging in a walk out in protest over hazardous and crowded working conditions" (Pet. App. 15a). The Board ordered petitioner, *inter alia*, to reinstate Singer with back pay (Pet. App. 16a).

3. The court of appeals, by *per curiam* order, enforced the Board's order, concluding that "substantial evidence" supported the Board's findings (Pet. App. 2a).[2]

---

[2] Judge Engel dissented, stating (Pet. App. 2a) that enforcement was unwarranted because there was "no substantial evidence" that Singer's action was concerted. He added (*ibid.*): "[T]he evidence shows at best that [Singer's] complaints were shared by others but that his individual conduct was entirely spontaneous."

ARGUMENT

The decision of the court of appeals is correct and conflicts with no decision of this Court or of any other court of appeals. Accordingly, further review is not warranted.

1. In *NLRB* v. *Washington Aluminum Co.*, 370 U.S. 9, 14-17 (1962), this Court made clear that concerted employee activity concerning safety conditions and working environment are protected by Section 7 of the National Labor Relations Act, 29 U.S.C. 157.[3] Petitioner contends (Pet. 5-15, 19-25), however, that Singer's complaint was not concerted and, therefore, that the court of appeals' decision enforcing the Board's order amounts to acceptance of the constructive concerted activity doctrine enunciated in *Alleluia Cushion, Inc.*, 221 N.L.R.B. 999, 1000 (1975). Accordingly, petitioner contends (Pet. 5-15) that the decision below conflicts with those of other circuits rejecting that doctrine. Petitioner's contention lacks merit.

In *Alleluia Cushion, supra*, the Board held that concerted activity will be deemed to exist whenever "an employee speaks up and seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees, in the absence of any evidence that fellow employees disavow such representation" (221 N.L.R.B. at 1000).[4]

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[3] In *Washington Aluminum Co.*, employees walked off the job at the beginning of their shift after several had made "more or less spontaneous individual pleas" (370 U.S. at 15) concerning the lack of heat in their workplace. The Court held that their conduct was concerted activity protected by Section 7 of the Act. Petitioner does not claim that Singer's activity in this case would be unprotected if concerted.

[4] *Alleluia Cushion* involved complaints to a state agency about safety conditions allegedly violating the law. However,

Several courts of appeals,[5] including the Sixth Circuit,[6] have rejected the *Alleluia Cushion* doctrine, holding that concerted activity may not be found unless there is some evidence that other employees supported or shared the concerns of the employee who took action.

In the present case, there is nothing to suggest that the court of appeals' decision rests upon the *Alleluia Cushion* doctrine.[7] First, there is no mention

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the Board has held that complaints to an employer about safety conditions enjoy the same protection as complaints to a governmental agency. *Akron General Medical Center*, 232 N.L.R.B. 920, 927 (1977).

[5] See, *e.g.*, *Krispy Kreme Doughnut Corp.* v. *NLRB*, 635 F.2d 304, 309-310 (4th Cir. 1980) (no showing that other employees supported individual's filing of workmen's compensation claims); *NLRB* v. *Bighorn Beverage*, 614 F.2d 1238, 1242 (9th Cir. 1980) (Board found that individual acted alone in filing a safety complaint); *NLRB* v. *Dawson Cabinet Co.*, 566 F.2d 1079, 1083-1084 (8th Cir. 1977) (no showing that other employees shared individual's concern about unequal pay for women); *NLRB* v. *Buddies Supermarkets, Inc.*, 481 F.2d 714, 717, 720 (5th Cir. 1973) (no showing that other employees shared individual's concern about rate paid).

[6] See *Jim Causley Pontiac* v. *NLRB*, 620 F.2d 122, 126 n.7 (6th Cir. 1980); *ARO, Inc.* v. *NLRB*, 596 F.2d 713 (6th Cir. 1979). However, the Sixth Circuit has cited *Alleluia Cushion* with apparent approval in another case, like this one, in which there was actual evidence of other employee concern. See *NLRB* v. *Lloyd A. Fry Roofing Co.*, 651 F.2d 442, 445 (6th Cir. 1981).

[7] It is true that the administrative law judge cited *Alleluia Cushion* in a footnote in her opinion (Pet. App. 15a n.7). However, the first two cases cited in that footnote—*Pink*

of that doctrine in the *per curiam* order enforcing the Board's decision or in the dissenting opinion. Second, the statement in the court's order that the Board's action was supported by "substantial evidence" (Pet. App. 2a) strongly suggests that the court's decision was based upon actual evidence of concerted action rather than the constructive concerted action rule. Similarly, the dissent argued simply (*ibid.*) that there was "no substantial evidence" to support the Board's order. Third, as noted, the Sixth Circuit had previously rejected the *Alleluia Cushion* doctrine, and it therefore seems highly unlikely that the court of appeals majority would silently overrule or ignore governing circuit precedent or that the dissent would fail to comment upon such a step.

It is therefore apparent that the decision below was not based upon the *Alleluia Cushion* doctrine, as petitioner claims, but upon the court's conclusion that there was "substantial evidence" (Pet. App. 2a) of actual concerted action. That factual determination does not warrant review by this Court. Moreover, the evidence clearly showed that Singer's action grew out of an issue about which other employees, acting individually and collectively, had earlier expressed concern to each other and to management. It consequently established that Singer's conduct was actually, and not "theoretically" (Pet. 5), part of a

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Moody, Inc., 237 N.L.R.B. 39 (1978), and *St. Joseph's High School*, 236 N.L.R.B. 1623 (1978)—involved situations in which individual action grew out of expressed collective concerns. In any event, there is nothing to suggest that the court of appeals relied upon the *Alleluia Cushion* doctrine in enforcing the Board's order.

course of continuing employee complaints, and that those complaints were fully known to management.[8]

Under such circumstances, the courts of appeals have uniformly found the activity at issue to be "concerted" within the meaning of Section 7 of the Act. For example, in *Hugh H. Wilson Corp.* v. *NLRB*, 414 F.2d 1345, 1354 (3d Cir. 1969), cert. denied, 397 U.S. 935 (1970), the court found that employee protests were concerted where they "reflected a general dissatisfaction which manifested itself, however inartfully, in the desire to do something about the disappointing [condition of employment]." And in *Pacific Electricord Co.* v. *NLRB*, 361 F.2d 310 (9th Cir. 1966), and *Morrison-Knudsen Co.* v. *NLRB*, 358 F.2d 411, 413 (9th Cir. 1966), it was held that where an individual complains about issues of expressed common concern, the individual is engaging in protected, concerted activity.

Earlier Sixth Circuit cases followed the same pattern without relying upon the *Alleluia Cushion* doctrine. In *NLRB* v. *Guernsey-Muskingum Electric Co-Op., Inc.*, 285 F.2d 8, 11-12 (6th Cir. 1960), an

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[8] Petitioner contends (Pet. 16-19) that, assuming Singer's complaint was concerted, the Company had no knowledge of that fact. However, the Board found (Pet. App. 14a) that the Company was well aware that the stacked boxes created crowded and hazardous conditions, since other employees had complained about the crowding and since the danger was evident. The Company was also aware that these conditions were a factor in Singer's walkout because he made that plain to Foreman Johnson before leaving. Vice President Darga acknowledged that the boxes were part of the "mess" to which Singer had referred. See *Hugh H. Wilson Corp.* v. *NLRB*, 414 F.2d 1345, 1355 (3d Cir. 1969), cert. denied, 397 U.S. 935 (1970).

employee was discharged after he complained individually to an official of the employer about a supervisory appointment. The court found that the employee had been engaged in concerted action because he had previously discussed and complained about the supervisory appointment with other employees and because two other employees had gone individually to the same company official to complain about the appointment. Similarly, in *NLRB* v. *Lloyd A. Fry Roofing Co.*, 651 F.2d 442, 445 (6th Cir. 1981), the court found an individual employee's action to be concerted where it grew out of his and other employees' complaints about the safety of a particular truck.[9]

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[9] The other cases relied on by petitioner (Pet. 11-13) are factually distinguishable. In *Pelton Casteel, Inc.* v. *NLRB*, 627 F.2d 23, 28-30 (7th Cir. 1980), the court, in rejecting the Board's finding that an individual's complaint was concerted, found that the individual and other employees who voiced similar complaints were expressing purely personal complaints and were not "airing a grievance of common concern" (*id.* at 29). In *Ontario Knife Co.* v. *NLRB*, 637 F.2d 840, 842 (2d Cir. 1980), the court, while conceding that the protest over working conditions was concerted, found that the employee walked off the job, not because of the expressed concern about working conditions, but because of her supervisor's insulting language. In *Kohls* v. *NLRB*, 629 F.2d 173, 177 (D.C. Cir. 1980), cert. denied, 450 U.S. 931 (1981), the court found no concerted action because there was no evidence that other employees shared the discharged employee's concern over the safety of his truck.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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